IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGELO C. BORIA, SR., On His Own Behalf, and as Co-Administrator of the Estate of Angelo C. Boria, Jr., Deceased; CARMEN AYALA, On Her Own Behalf, and as Co-Administrator of the Estate of Angelo C. Boria, Jr., Deceased; and EDWARD L. COURTNEY, JR.,	) Civil Action) No. 06-cv-4384
Plaintiffs	)
vs.	)
OFFICER ROBERT BOWERS, Individually, and in His Official Capacity as Member of the Reading Police Department; OFFICER DAVID D. HOGAN, Individually, and in His Official Capacity as Member of the Reading Police Department; CHIEF CHARLES R. BROAD; MAYOR THOMAS McMAHON; JOHN DOES I-X, Individually, and in Their Official Capacity as Members of the Reading Police Department; and CITY OF READING,	)
Defendants	)

O R D E R

NOW, this 31st day of March, 2009, upon consideration of The Reading Defendants' Motion for Summary Judgment filed July 14, 2008[1]; upon consideration of the Brief in Support of the

[1] Defendants Officer Robert Bowers, Officer David D. Hogan, Chief Charles R. Broad, Mayor Thomas McMahon and the City of Reading are collectively the "Reading Defendants".

Reading Defendants' Motion for Summary Judgment[2]; and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that The Reading Defendants' Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that The Reading Defendants' Motion for Summary Judgment is granted as to plaintiffs' claims for delaying medical treatment, unlawful seizure and arrest, and plaintiffs' various Monell claims[3] in Count I.

IT IS FURTHER ORDERED that plaintiffs' claims for delaying medical treatment, unlawful seizure and arrest, and plaintiffs' various Monell claims in Count I are dismissed from Count I of plaintiffs' Complaint.

IT IS FURTHER ORDERED that The Reading Defendants' Motion for Summary Judgment is granted as to Counts II, V, VI, VII and VIII of plaintiffs' Complaint.

IT IS FURTHER ORDERED that Counts II, V, VI, VII and VIII are dismissed from plaintiffs' Complaint.

IT IS FURTHER ORDERED that all claims asserted in plaintiffs' Complaint against defendants Chief Charles R. Broad, Mayor Thomas McMahon, and the City of Reading are dismissed.

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[2] Plaintiffs did not file a brief or response in opposition to The Reading Defendants' Motion for Summary Judgment.

[3] Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

IT IS FURTHER ORDERED that defendants Chief Charles R. Broad, Mayor Thomas McMahon, and the City of Reading are dismissed as parties to this action.

IT IS FURTHER ORDERED that all claims asserted in plaintiffs' Complaint against fictitious defendants John Does I-X are dismissed.

IT IS FURTHER ORDERED that fictitious defendants John Does I-X are dismissed as parties to this action.

IT IS FURTHER ORDERED that The Reading Defendants' Motion for Summary Judgment is denied as to plaintiffs' claims for excessive force, unlawful damage to the residence and destruction of property, and conspiracy in Count I and as to Counts III and IV in their entirety.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGELO C. BORIA, SR., On His Own Behalf, and as Co-Administrator of the Estate of Angelo C. Boria, Jr., Deceased; CARMEN AYALA, On Her Own Behalf, and as Co-Administrator of the Estate of Angelo C. Boria, Jr., Deceased; and EDWARD L. COURTNEY, JR.,	) Civil Action) No. 06-cv-4384
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Defendants	)

* * *

APPEARANCES:

JOHN P. KAROLY, JR., ESQUIRE
On behalf of Plaintiffs

DAVID J. MacMAIN, ESQUIRE
JANELLE E. FULTON, ESQUIRE
On behalf of Defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on The Reading Defendants' Motion for Summary Judgment, which motion was filed on behalf of defendants Officer Robert Bowers, Officer David D. Hogan, Chief Charles R. Broad, Mayor Thomas McMahon and the City of Reading (collectively, the "Reading Defendants"), on July 14, 2008.[4] Plaintiffs' Answer to Defendants' Statement of Undisputed Facts ("Plaintiffs' Facts") was filed on August 14, 2008.[5] Plaintiffs did not file a brief or response in opposition to defendants' motion for summary judgment.

Upon consideration of the Reading Defendants' brief and the parties' statements of disputed and undisputed facts, and for

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[4] On July 14, 2008, the Reading Defendants also filed their Brief in Support of the Reading Defendants' Motion for Summary Judgment ("Defendants' Brief") and their Statement of Relevant Undisputed Facts in Support of the Reading Defendants' Motion for Summary Judgment ("Defendants' Facts").

The Reading Defendants' Reply to Plaintiffs' Answer to the Statement of Relevant Undisputed Facts in Support of the Reading Defendants' Motion for Summary Judgment was filed on August 29, 2008.

[5] At the commencement of this action on September 29, 2006 this case was assigned to my colleague District Judge Thomas M. Golden. On October 23, 2006 the case was reassigned from Judge Golden to my colleague District Judge Lawrence F. Stengel. On October 9, 2008 the case was reassigned from Judge Stengel to me.

On July 30, 2008, plaintiffs filed their unopposed Motion to Enlarge Time to Respond to Defendants' Motion For Summary Judgment and requested a 14-day extension of time in which to respond to The Reading Defendants' Motion for Summary Judgment. Because plaintiffs filed their response on August 14, 2008, Judge Stengel entered an Order on August 18, 2008 denying plaintiffs' motion for enlargement of time as moot.

the reasons articulated in this Opinion, I grant in part and deny in part The Reading Defendants' Motion for Summary Judgment.

Specifically, I grant The Reading Defendants' Motion for Summary Judgment as to plaintiffs' federal constitutional claims under Section 1983 in Count I for delaying medical treatment, unlawful seizure and arrest, and plaintiffs' various Monell claims.[6] I also grant The Reading Defendants' Motion for Summary Judgment as to plaintiffs' state-law claims for negligence and negligent supervision (Count II), intentional infliction of emotional distress (Count V), negligent infliction of emotional distress (Count VI), false arrest (Count VII) and false imprisonment (Count VIII).

Because all claims against them have been dismissed, I dismiss defendants Chief Charles R. Broad, Mayor Thomas McMahon and the City of Reading as parties to this action. In addition, I dismiss the fictitious defendants, John Does 1-X, because discovery has closed without plaintiffs identifying these defendants.

I deny The Reading Defendants' Motion for Summary Judgement as to plaintiffs' federal Section 1983 constitutional claims in Count I for excessive force, unlawful damage to the residence and destruction of property, and conspiracy. I also deny The Reading Defendants' Motion for Summary Judgment as to

[6] Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

plaintiffs' state claims under the Pennsylvania Survival Act[7] (Count III) and the Pennsylvania Wrongful Death Act[8] (Count IV).

JURISDICTION

Jurisdiction in this case is based upon federal question jurisdiction. 28 U.S.C. §§ 1331, 1343. The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367.

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiffs' claims allegedly occurred in the City of Reading in Berks County, Pennsylvania, which is located within this judicial district.

PROCEDURAL HISTORY

Complaint

On September 29, 2006, plaintiffs Angelo C. Boria, Sr., Carmen Ayala, and Edward L. Courtney, Jr. filed their Complaint against defendants Officer Robert Bowers, Officer David D. Hogan, Chief Charles R. Broad, Mayor Thomas McMahon, John Does 1-X, Dr. Nicholas Bybel, the City of Reading, and the County of

[7] 42 Pa.C.S.A. § 8302.

[8] 42 Pa.C.S.A. § 8301.

Berks.[9] Both plaintiffs Boria, Sr. and Ayala bring this suit in their own behalf and as the co-administrators of the estate of their deceased son, Angelo C. Boria, Jr.

Plaintiffs bring their claims against defendants Bowers, Hogan, and Does 1-X in both defendants' individual capacities and in their official capacities as members of the Reading Police Department. Both defendants Chief of Police Broad and Mayor McMahon are in this lawsuit in their individual capacities only.[10]

Plaintiffs' eight-count Complaint alleges various constitutional violations brought pursuant to 42 U.S.C. § 1983, as well as several pendent state-law claims arising out of the death of Angelo C. Boria, Jr. and the arrest of plaintiff Edward L. Courtney, Jr. on October 1, 2004 in Reading, Pennsylvania by a Reading police officer for allegedly possessing a sawed-off shotgun.

In Count I, all plaintiffs sue all defendants pursuant to Section 1983 alleging multiple constitutional violations.

Although the Complaint is not very clear in some respects, it appears that plaintiffs are bringing five Section

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[9] On January 9, 2009, by agreement of counsel, I dismissed all claims against defendants Bybel and the County of Berks.

[10] Originally Chief Broad was sued in both his individual capacity and in his official capacity as Chief of Police of the Reading Police Department, and Mayor McMahon was sued in both his individual capacity and in his official capacity as Mayor of the City of Reading, Pennsylvania. However, on September 17, 2007 Judge Stengel issued an Order striking all references to Chief Broad and Mayor McMahon being sued in their official capacities.

1983 claims for alleged constitutional violations: (1) use of excessive force; (2) delaying medical treatment; (3) unlawful seizure and arrest; (4) unlawful damage to the residence and destruction of property; and (5) conspiracy.[11] Plaintiffs also bring related Monell claims against defendants for developing, implementing, and carrying out policies, practices, or procedures which caused these alleged constitutional harms to plaintiffs.

In Count II, all plaintiffs bring pendent state-law claims for negligence and negligent supervision against the Reading Defendants and Does 1-X.

In Count III, plaintiffs Boria and Ayala bring a Pennsylvania Survival Act claim against the Reading Defendants and Does 1-X. In Count IV, those plaintiffs bring a claim under the Pennsylvania Wrongful Death Act against those defendants.

In Count V, all plaintiffs allege a state-law claim of intentional infliction of emotional distress against the Reading Defendants and Does 1-X. In Count VI, all plaintiffs allege a state claim for negligent infliction of emotional distress against these defendants.

In Count VII, plaintiff Courtney brings a Pennsylvania state false arrest claim against the Reading Defendants and Does

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[11] The Complaint claims that defendants violated the Constitution by "making public statements and producing official reports designed to cover up their unlawful and unconstitutional acts as well as the true cause of Decedent's death." Complaint at page 17. I interpret this as alleging a Section 1983 conspiracy claim.

1-X. In Count VIII, plaintiff Courtney brings a state-law false imprisonment claim against these defendants.

Reading Defendants' Motion to Dismiss

The Reading Defendants filed the Motion of the Reading Defendants to Dismiss Portions of Plaintiffs' Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) on February 12, 2007. Plaintiffs filed their Memorandum of Law in Opposition to Reading Defendants' Motion to Dismiss Portions of Plaintiffs' Complaint on May 16, 2007. In their response, plaintiffs withdrew their claims under the Eighth Amendment.[12]

On September 17, 2007, Judge Stengel granted the Reading Defendants' motion to dismiss in part and denied the motion in part. Judge Stengel's Order dismissed: (1) Count II (negligence and negligent supervision) against the Reading Defendants; (2) Counts III (survival action), IV (wrongful death), and V (intentional infliction of emotional distress) against defendants Broad, McMahon, and the City of Reading; and (3) Count VI (negligent infliction of emotional distress) against the Reading Defendants.[13] In addition, Judge Stengel's Order

[12] Memorandum of Law in Opposition to Reading Defendants' Motion to Dismiss Portions of Plaintiffs' Complaint at page 4 n.1.

[13] Judge Stengel's Order left fictitious defendants Does 1-X as the only remaining defendants in Counts II (negligence and negligent supervision) and VI (negligent infliction of emotional distress). Below, I dismiss fictitious defendants Does 1-X from this action because discovery has been closed for some time and plaintiffs have not identified these defendants. Accordingly, I will not further address plaintiffs' Counts II and VI claims in this Opinion.

struck all reference to: (1) defendants Broad and McMahon being sued in their official capacities; (2) defendants Bowers and Hogan being sued in their official capacities in Counts II-VI; and (3) alleged violations of the Pennsylvania Constitution under Section 1983.

Discovery

Judge Stengel's September 18, 2007 Scheduling Order ordered discovery to be completed by December 14, 2007 and set a January 15, 2008 deadline for plaintiffs' expert reports. On December 7, 2007 defendants filed a motion requesting that defendants' discovery deadline be extended 60 days until February 12, 2008, and that plaintiffs be required to provide defendants with copies of all materials prepared by or relating to Dr. John J. Shane[14] by December 21, 2007 or be precluded from offering any testimony, or material prepared, by Dr. Shane as evidence in this case.

On February 19, 2008, Judge Stengel granted defendants' motion, extended defendants' discovery deadline by sixty days from the date of his Order, and ordered plaintiffs to provide defendants with copies of all materials prepared by, or referring to, Dr. Shane within 10 days of the date of his February 19, 2008

[14] John J. Shane, M.D. is plaintiffs' expert pathologist.

Order or be precluded from offering any testimony, or material prepared, by Dr. Shane as evidence in this case.

As I noted in footnote 2, above, this case was reassigned from Judge Stengel to me on October 10, 2008. My December 18, 2008 Order granted in part and denied in part The Reading Defendants' Motion to Strike the Report of Dr. John J. Shane, struck Dr. Shane's report and all references thereto from Plaintiffs' Answer to Defendants' Statement of Undisputed Facts, and precluded plaintiffs from offering any testimony, or material prepared, by Dr. Shane as evidence in this case.

My Order was based, in part, upon the fact that plaintiffs did not produce Dr. Shane's report until August 14, 2008, nearly six months after Judge Stengel's deadline, and the fact that plaintiffs did not file a response to defendants' motion to strike Dr. Shane's report.

As noted in footnote 6, above, on January 9, 2009, by agreement of counsel, I dismissed all claims against defendants Bybel and the County of Berks.

This matter is now before the court on The Reading Defendants' Motion for Summary Judgment.

FACTS DEEMED ADMITTED

Judge Stengel's Rule 16 Conference Notices filed October 31, 2006, February 12, 2007 and March 28, 2007 directed

the parties "to comply with Judge Stengel's Polices and Procedures".

Judge Stengel's Policies and Procedures require any party moving for summary judgment to include with their motion a statement setting forth all undisputed facts which entitle the movant to summary judgment, and require any party opposing summary judgment to set forth a statement of the material facts which present genuine issues for trial.

These statements of material fact must "include specific and not general references to the parts of the record that support each statement. Each stated fact shall cite the source relied upon, including the page and line of any document to which reference is made." Judge Stengel's Policies and Procedures also give the parties notice that the court "will accept all material facts set forth in the moving party's statement as admitted unless controverted by the opposing party."[15]

In this case, defendants filed a statement of undisputed facts in support of their motion for summary judgment. Although plaintiffs filed a statement of disputed facts, they did not do so in the manner set forth in Judge Stengel's Policies and Procedures. Specifically, plaintiffs failed to provide specific

[15] Judge Stengel's Policies and Procedures, Section II, C.4., Eastern District of Pennsylvania Federal Practice Rules Annotated (Peter F. Vaira, Ed.), Gann Law Books, 2006 Edition, Appendix 1, page 705; 2007 Edition, Appendix I, page 735.

references to the record for their counter averments of fact in numerous paragraphs. In addition, in many other paragraphs, plaintiffs relied solely on Dr. Shane's report to support their disputed facts, despite the fact that all references to Dr. Shane's report were stricken by my December 19, 2008 Order.

Requiring a statement of undisputed facts and a responsive statement of material facts which present genuine issues for trial is consistent with Rule 56 of the Federal Rules of Civil Procedure. Rule 56 requires the movant to provide proof that there are no genuine issues of material fact, and requires the non-movant to "not rely merely on allegations or denials in its own pleading...[but to] set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2).

In addition, Rule 83(b) of the Federal Rules of Civil Procedure provides:

> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Plaintiffs had notice of Judge Stengel's Policies and Procedures, which clearly were not complied with.

Accordingly, for the purposes of the within motion, I deem admitted all facts contained in paragraphs 5-6, 15, 20-21, 23-26, 28, 30, 32-34, 37, and 40-42 of the Statement of Relevant Undisputed Facts in Support of the Reading Defendants' Motion for Summary Judgment filed July 14, 2008 (Document 25-2).

STANDARD OF REVIEW

As indicated above, plaintiffs did not file a brief or response in opposition to The Reading Defendants' Motion for Summary Judgment. Rule 7.1(c) of the Local Rules of the United States District Court for the Eastern district of Pennsylvania ("Local Rules") provides that

> any party opposing [a] motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion.... In the absence of a timely response, the motion may be granted as uncontested except that a summary judgment motion, to which there has been no timely response will be governed by Fed.R.Civ.P. 56(c).[16]

E.D.Pa.R.Civ.P. 7.1(c).

Federal Rule of Civil Procedure 56(e)(2) (formerly Rule 56(c)) provides that "[i]f the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." (Emphasis added). Pursuant to this rule, failure to respond to a summary judgment motion is not fatal to

[16] Federal Rule of Civil Procedure 56(c) has been renumbered 56(e)(2).

plaintiffs' claims because the court has the obligation to review the merits of an unopposed summary judgment motion. Peter v. Lincoln Technical Institute, 255 F.Supp.2d 417, 426 (E.D.Pa. 2002) (Van Antwerpen, J.).

The court should grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Startzell v. City of Philadelphia, 533 F.3d 183, 192 (3d Cir. 2008). See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

"The court must view all evidence and draw all inferences in the light most favorable to the non-moving party, and summary judgment is appropriate only if there are no genuine issues of material fact." Startzell, 533 F.3d at 192. Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248, 106 S.Ct. at 2510; 91 L.Ed.2d at 211.

Once the party moving for summary judgment has satisfied its burden by showing that there are no genuine disputes as to any material facts, the non-movant must provide evidence to support each element on which it bears the burden of proof. See Monroe v. Beard, 536 F.3d 198, 206-207 (3d Cir.

2008); Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 414 (3d Cir. 1999).

Plaintiffs cannot avert summary judgment with speculation or by resting on the allegations in the pleadings, but rather must present competent evidence from which a jury could reasonably find in plaintiffs' favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Berrier v. Simplicity Corporation, 413 F.Supp.2d 431, 437 (E.D.Pa. 2005)(Davis, J.).

FACTS

Based upon the foregoing standard of review, the Statement of Relevant Undisputed Facts in Support of the Reading Defendants' Motion for Summary Judgment ("Defendants' Facts"), including the facts deemed admitted as enumerated above; the depositions, affidavits and other record papers enumerated in the footnotes in this section; the pleadings; the pertinent facts and inferences viewed in the light most favorable to the plaintiffs as the non-moving parties, are as follows.

On October 1, 2004, at about 10:30 p.m., plaintiff Edward L. Courtney, Jr. was sleeping in his upstairs bedroom at 338 Pearl Street, Reading, Pennsylvania.[17] Angelo C. Boria, Jr.,

[17] Deposition of Edward L. Courtney, Jr. ("Courtney Deposition") at page 57. Portions of the Courtney Deposition were attached as Exhibit C to The Reading Defendants' Motion for Summary Judgment, and as Exhibit A to Plaintiffs' Answer to Defendants' Statement of Undisputed Facts.

the decedent, was watching television downstairs with Alan Gregory Santana, decedent's cousin.[18] Joshue Harvey, Courtney's stepson, was washing dishes in the kitchen.[19] Decedent was engaged to Courtney's stepdaughter, Samantha Riefsnyder, and had been living with Courtney's family for parts of three to four months.[20]

Downstairs, decedent picked up a loaded shotgun and then tripped over a speaker wire, causing the shotgun to accidentally fire through the home's front window.[21] Alan went upstairs and woke Courtney to tell him that Angel accidentally fired the shotgun.[22] Reading police officers responded after receiving a 9-1-1 call that shots had been fired in the home and that a juvenile male was screaming for help.[23] Police officers broke open the door and entered Courtney's residence.[24] Officers

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[18] Courtney Deposition at pages 58-59; Affidavit of Alan Gregory Santana ("Santana Affidavit") at page 21, Exhibit D to The Reading Defendants' Motion for Summary Judgment.

[19] Courtney Deposition at pages 13-14 and 58-59; Santana Affidavit at page 21.

[20] Courtney Deposition at pages 13-15.

[21] Defendants' Facts at paragraph 4; Courtney Deposition at pages 60 and 70; Santana Affidavit at page 21; Plaintiffs' Facts at paragraph 4.

[22] Courtney Deposition at pages 59-60.

[23] Defendants' Facts at paragraph 2; CAD Operations Report at page 3, Exhibit A to The Reading Defendants' Motion for Summary Judgment; Plaintiffs' Facts at paragraph 2.

[24] Courtney Deposition at pages 71-73; Santana Affidavit at page 23.

Bowers and Hogan were the first officers to enter the residence.[25]

The police officers told Courtney not to move and handcuffed decedent, who was lying on the floor with his hands behind his back.[26] While decedent was on the floor and handcuffed, Officers Bowers and Hogan started beating him.[27] One of the officers hit decedent "between five and ten" times in the head and upper left shoulder with a metal flashlight, and kicked him in the left side "four or five times."[28] Another "five to six" officers struck decedent with their batons and flashlights, and kicked, hit, and stomped decedent.[29]

This beating continued for "three to four, five minutes."[30] Decedent remained handcuffed and face down during the entire beating.[31] After the beating, the police officers grabbed decedent by the handcuffs and "yanked him up" because he

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[25] Defendants' Facts at paragraph 3; Plaintiffs' Facts at paragraph 3; Reading Police Department Summary Incident Report ("Summary Incident Report") at pages 8 and 12; The Reading Defendants' Motion for Summary Judgment at page 8. Portions of the Summary Incident Report were attached as Exhibit B to The Reading Defendants' Motion for Summary Judgment, and as Exhibit D to Plaintiffs' Answer to Defendants' Statement of Undisputed Facts.

[26] Courtney Deposition at pages 77-79.

[27] Courtney Deposition at pages 78-79; Summary Incident Report at pages 9 and 12-13.

[28] Courtney Deposition at pages 80-83.

[29] Courtney Deposition at pages 85-88 and 93-94.

[30] Courtney Deposition at page 140.

[31] Courtney Deposition at pages 92 and 95-96.

wasn't able to get up under his own strength.[32] The police officers threw or shoved decedent out the door.[33]

Decedent suffered severe injuries, including "blunt force trauma to the head" and a fractured rib.[34] This beating caused decedent's death.

The police officers then began turning over and breaking things in Courtney's house.[35] The police officers first tipped over and broke a large entertainment center which contained a big screen television.[36] The police officers then moved an antique bureau which contained various "knickknacks," breaking "a lot" of them in the process.[37] The police officers also picked up and threw large stereo speakers into the kitchen, denting the refrigerator.[38]

The police officers found the shotgun that decedent accidentally fired in plain view.[39]

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[32] Courtney Deposition at pages 100-101.

[33] Courtney Deposition at pages 101-102.

[34] Dr. Land's Autopsy Report ("Land Report") at page 3. Dr. Land's Autopsy Report was attached as Exhibit F to The Reading Defendants' Motion for Summary Judgment, and as Exhibit C to Plaintiffs' Answer to Defendants' Statement of Undisputed Facts.

[35] Courtney Deposition at pages 110-111.

[36] Courtney Deposition at pages 110-111.

[37] Courtney Deposition at page 111.

[38] Courtney Deposition at page 114.

[39] Defendants' Facts at paragraph 34; Plaintiffs' Facts at paragraph 34.

Ten minutes elapsed between the time decedent was arrested and when the decedent first received medical care.[40]

The police also arrested Courtney and Santana.[41]

Courtney attended a single one hour counseling session shortly after the incident.[42] Courtney did not see any other counselors except for his family physician, with whom he did not talk specifically about the incident.[43] Since the incident, Courtney has suffered "two mini-strokes" and has had difficulty sleeping.[44]

DISCUSSION

Count I (Section 1983 Constitutional Claims)

Plaintiffs' constitutional claims are actionable against defendants through 42 U.S.C. § 1983. Section 1983 is an enabling statute that does not create any substantive rights, but provides a remedy for the violation of federal constitutional or statutory rights. Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). Section 1983 states:

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[40] Summary Incident Report at page 5; Exhibit E to Plaintiffs Answer to Defendants' Statement of Undisputed Facts at page 2.

[41] Courtney Deposition at pages 125-129; Santana Affidavit at page 22.

[42] Courtney Deposition at pages 115-118.

[43] Courtney Deposition at pages 117-119.

[44] Courtney Deposition at pages 118 and 157-158.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Thus, to state a claim under Section 1983, a plaintiff must allege that defendant, acting under color of state law, deprived plaintiff of a federal constitutional or statutory right. Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008); Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006). A defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40, 49 (1988); Bonenberger v. Plymouth Township, 132 F.3d 20, 23 (3d Cir. 1997).

Qualified Immunity

Defendants Bowers and Hogan assert that they are entitled to qualified immunity regarding plaintiffs' Section 1983 claims. Qualified immunity protects government officials from Section 1983 suits under certain circumstances. Qualified immunity exists to protect officials exercising good faith in

their discretionary duties from the unreasonable burdens of litigation. Any potential good from suits against government officials for discretionary acts is outweighed by the chilling effect such litigation would have on legitimate government activities. See Butz v. Economou, 438 U.S. 478, 506, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895, 916 (1978); Karnes v. Skrutski, 62 F.3d 485, 499 n.13 (3d Cir. 1995).

To overcome an assertion of qualified immunity, a plaintiff must satisfy a two-prong test. The court must "decide whether the facts, taken in the light most favorable to the plaintiff, demonstrate a constitutional violation" and "whether the constitutional right in question was clearly established." Couden v. Duffy, 446 F.3d 483, 492 (3d Cir. 2006).

Courts are no longer required to decide the first prong of this test before moving on to the second prong, but it is "often beneficial" for courts to apply the test in this order. Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The test for whether a constitutional right is clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted....If the officer's mistake as to what the law requires is reasonable, the officer is entitled to qualified immunity." Id. (internal punctuation omitted).

Qualified immunity is an immunity from suit, not merely a defense to liability. Pearson, 555 U.S. ___, 129 S.Ct. 808, 172 L.Ed.2d 565; Saucier v. Katz, 533 U.S. 194, 200-201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281 (2001). Accordingly, it is important to resolve questions of qualified immunity at the earliest possible stage of the litigation. Pearson, 555 U.S. ___, 129 S.Ct. 808, 172 L.Ed.2d 565; Saucier, 533 U.S. at 200-201, 121 S.Ct. at 2156, 150 L.Ed.2d at 281.

However, the Third Circuit has explained that

> the importance of resolving qualified immunity questions early is in tension with the reality that factual disputes often need to be resolved before determining whether defendant's conduct violated a clearly established constitutional right....A decision as to qualified immunity is premature when there are unresolved disputes of historical facts relevant to the immunity analysis.

Phillips v. County of Allegheny, 515 F.3d 224, 242 n.7 (3d Cir. 2008) (citing Curley v. Klem, 499 F.3d 199 (3d Cir. 2007)) (internal punctuation omitted).

The normal principles of summary judgment apply when qualified immunity is at issue, and it is inappropriate to grant summary judgment if there are material factual disputes as to whether a constitutional violation has occurred or whether the constitutional right is clearly established. See Curley v. Klem, 499 F.3d at 208; Estate of Smith v. Marasco, 430 F.3d 140, 148 n.3 (3d Cir. 2005).

Accordingly, I examine the alleged constitutional violations of excessive force, delaying medical treatment, and unlawful seizure and arrest to determine whether defendants Bowers and Hogan are entitled to qualified immunity. As we shall see, neither officer is entitled to qualified immunity on plaintiffs' excessive force claim, and both officers are entitled to qualified immunity on plaintiffs' claims for delaying medical treatment and for unlawful seizure and arrest.

Excessive Force

"An excessive force claim under § 1983 arising out of law enforcement conduct is based on the Fourth Amendment's protection from unreasonable seizures of the person." Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). "The use of excessive force is itself an unlawful 'seizure' under the Fourth Amendment." Couden v. Duffy, 446 F.3d 483, 496 (3d Cir. 2006). Freedom from excessive force is a clearly established constitutional right. Id. at 497; Diamond v. Philadelphia, 2007 U.S.Dist. LEXIS 87646, *11 (E.D.Pa. November 28, 2007) (Diamond, J.). Moreover, "[t]he factors relevant to the excessive force analysis are well-recognized." Couden, 446 F.3d at 497.

To decide whether the challenged conduct constitutes excessive force, I must determine the objective reasonableness of the challenged conduct. Id. at 496. In making this

determination, I consider the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, whether the suspect is actively resisting arrest or attempting to evade arrest by flight, the duration of the police officers' action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time. Id. at 496-497; Estate of Smith, 430 F.3d at 150.

Because "police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain and rapidly evolving--about the amount of force that is necessary in a particular situation," I consider the perspective of a reasonable officer rather than using the 20/20 vision of hindsight in evaluating reasonableness. Couden, 446 F.3d at 497.

Viewing the evidence in the light most favorable to the plaintiffs,[45] as I must on a motion for summary judgment, decedent was on the floor with his hands behind his back when two police officers handcuffed decedent and started beating him. One of the officers hit decedent "between five and ten" times in the

[45] I note that "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story--the person shot dead--is unable to testify." Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999) (internal punctuation omitted); Vak La v. Hayducka, 269 F.Supp.2d 566, 580 (D.N.J. 2003) (internal punctuation omitted).

head and upper left shoulder with a metal flashlight, and kicked him in the left side "four or five times."[46]

Another "five to six" officers struck decedent with their batons and flashlights, and kicked, hit, and stomped decedent.[47] This beating continued for "three to four, five minutes."[48] Decedent remained handcuffed and face down during the entire beating.

After the beating, the police officers grabbed decedent by the handcuffs and "yanked him up" because he wasn't able to get up under his own strength.[49] The police officers threw or shoved decedent out the door. Decedent suffered severe injuries, including "blunt force trauma to the head" and a fractured rib.[50]

Here, plaintiffs presented evidence that decedent posed no immediate threat to officer safety. Decedent did not resist arrest while defendant police officers beat him for several minutes. "[S]even to eight" police officers entered the house, where only a couple of people were home.[51]

These factors support a finding of excessive force. This conclusion is further supported by the fact that the

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[46] Courtney Deposition at pages 80-83.

[47] Courtney Deposition at pages 85-88 and 93-94.

[48] Courtney Deposition at page 140.

[49] Courtney Deposition at pages 100-101.

[50] Land Report at page 3.

[51] Courtney Deposition at page 86.

decedent did not resist arrest while on the ground. See Morrison v. Phillips, 2008 U.S.Dist. LEXIS 71205, *31 (D.N.J. September 16, 2008); Peschko v. Camden, 2006 U.S.Dist. LEXIS 43871, *17-18 (D.N.J. June 28, 2006); see also Couden, 446 F.3d at 497.

The Third Circuit's decision in Couden is instructive. In Couden,

> four officers jumped on [plaintiff] Adam, pointed guns at his head, handcuffed him, and sprayed him with mace. One of the officers was on top of Adam with his knee in Adam's back. Although the officers may have believed that Adam was an intruder at the time, this level of force was unnecessary and constitutionally excessive. There was no evidence that Adam was resisting arrest or attempting to flee, and in his affidavit he stated that he "did what [the officers] told [him] to do" because he knew he was "one against a group." The police had no reason to believe that Adam was armed or that any accomplice was present, and there were four officers available to subdue him if he became violent. The participation of so many officers and the use of mace, several guns pointed at Adam's head, and handcuffs constituted excessive force against a cooperative and unarmed subject.

Couden, 446 F.3d at 497.

Moreover, on similar facts, numerous district courts in this circuit have held that excessive force was used. Courts in the Eastern District of Pennsylvania have held that they would find that excessive force was used where "multiple officers beat and kicked a handcuffed Mr. Hammock gratuitously while plaintiffs were being assaulted," and where plaintiff did not resist arrest

yet was forcibly handcuffed and then slammed into parked cars, sprayed with pepper spray, and hit in the ribs, legs, and neck with clubs. See Hammock v. Upper Darby, 2007 U.S.Dist. LEXIS 80493, *19 (E.D.Pa. October 31, 2007) (Davis, J.); Reynolds v. Smythe, 418 F.Supp.2d 724, 726, 735 (E.D.Pa. 2006) (DuBois, S.J.).

Other district courts in this circuit have denied defendants' motions for summary judgment on excessive force claims where there was evidence that plaintiff was on the ground, handcuffed, and not struggling while defendant police officers repeatedly punched plaintiff in the back, stood on top of him, and sprayed mace in his face, and also where defendant police officers hit plaintiff without provocation, repeatedly struck plaintiff while he lay motionless on the ground, and sprayed plaintiff with pepper spray, "especially considering [plaintiff's] claim that he did not resist arrest once on the ground." See Morrison, 2008 U.S.Dist. LEXIS 71205 at *30-31 (D.N.J.); Peschko, 2006 U.S.Dist. LEXIS 43871 at *16-18 (D.N.J.).

In light of the case law discussed above, a reasonable police officer would not have believed that the force used against decedent was legal under the circumstances. Thus, I conclude that Officers Bowers and Hogan are not entitled to qualified immunity at this time on plaintiffs' excessive force

claim.[52] Plaintiffs have submitted evidence which, if credited, would establish the violation of a constitutional right. Moreover, this constitutional right, freedom from excessive force, is clearly established. Because there are disputed issues of material fact, I deny summary judgement to defendants Bowers and Hogan on plaintiffs' excessive force claim.

Disputed Issues of Material Fact

The Third Circuit requires that district court "dispositions of a motion in which a party pleads qualified immunity include, at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues." Forbes v. Township of Lower Merion, 313 F.3d 144, 149 (3d Cir. 2002). The district court must "specify those material facts that are and are not

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[52] Plaintiffs have not presented evidence that Officers Bowers and Hogan were the police officers who allegedly used excessive force in beating decedent. However, the evidence indicates that Officers Bowers, Hogan, and Rentschler were the first police officers to enter the house (Summary Incident Report at pages 8 and 12), and that Officers Bowers and Hogan were the first to approach the decedent. (Summary Incident Report at pages 9 and 12-13). Defendants concede that Officers Hogan, Bowers, and Rentschler were the first officers to arrive at the scene. (Defendants' Brief at page 8; Defendants' Facts at paragraph 3).

"[A] reasonable jury could conclude that since the evidence...places these individuals at the scene of the assault, they were responsible for the use of excessive force." Gulley v. Elizabeth City Police Department, 2006 U.S.Dist. LEXIS 93698, *28 (D.N.J. December 13, 2006). Where "it is undisputed that all of the named officers were in the vicinity" of the alleged beating, "[t]he extent of each officer's participation is thus a classic factual dispute to be resolved by the fact finder." Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002). Accordingly, plaintiffs' failure to present evidence that Officers Bowers and Hogan were the police officers who allegedly used excessive force against decedent is not fatal to plaintiffs' claim.

subject to genuine dispute and explain their materiality." Id. at 146.

There are genuine disputes about the following material facts relevant to determining whether defendants are entitled to qualified immunity on plaintiffs' excessive force claim. They are:

(1) whether decedent resisted arrest;

(2) whether defendant police officers struck decedent to overcome his resistance, or beat a cooperating suspect; and

(3) the nature and extent to which defendant police officers struck decedent.

At trial, a jury will resolve these material factual disputes relevant to the question of whether defendants are entitled to qualified immunity on plaintiffs' excessive force claim.

Delaying Medical Treatment

Plaintiffs claim that defendants violated decedent's constitutional rights by delaying urgently needed medical treatment. Defendants Bowers and Hogan assert that they are entitled to qualified immunity.

Plaintiffs have produced evidence that ten minutes may have elapsed between the time decedent was arrested and when the

decedent first received medical care.[53] However, there is no evidence in the record that defendants Bowers and Hogan were involved in the alleged unconstitutional delay of medical treatment.

The uncontradicted evidence shows that Officers Burr, Mayer, Schultz, and Shilling were escorting the decedent down the block from Courtney's home to the police wagon when decedent became unresponsive and appeared unconscious.[54] Defendants Bowers and Hogan were in Courtney's house at this time.[55]

Because there is no evidence that defendants Bowers and Hogan were involved in delaying medical treatment to the decedent, there is no material issue of disputed fact as to whether defendants Bowers and Hogan violated decedent's constitutional rights by delaying medical treatment.

Accordingly, defendants Bowers and Hogan are entitled to qualified immunity on plaintiffs' claim for delaying medical treatment, and I grant summary judgment on their behalf.[56]

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[53] Summary Incident Report at page 5; Exhibit E to Plaintiffs' Answer to Defendants' Statement of Undisputed Facts at page 2.

[54] Summary Incident Report at page 6.

[55] Summary Incident Report at pages 9 and 13.

[56] Because I find below that defendants Broad, McMahon, and the City of Reading are entitled to summary judgment on plaintiffs' constitutional claims under Section 1983, I grant The Reading Defendants' Motion for Summary Judgment as to plaintiffs' claim for delaying medical treatment.

Unlawful Seizure and Arrest

Although it is not totally clear from their Complaint, plaintiffs appear to bring claims under Section 1983 for violations of the Fourth Amendment for the allegedly unlawful seizures and arrests of decedent and Courtney. "The proper inquiry in a section 1983 claim based on false arrest...is not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense." Groman, 47 F.3d at 634.

The Third Circuit has explained that

> [p]robable cause is defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense....This standard is meant to safeguard citizens from rash and unreasonable interferences with privacy and to provide leeway for enforcing the law in the community's protection.

United States v. Boynes, 149 F.3d 208, 211 (3d Cir. 1998) (internal punctuation omitted).

Pennsylvania law prohibits the possession or use of any sawed-off shotgun with a barrel less than 18 inches long. 18 Pa.C.S. § 908. In addition, federal law prohibits the possession of any unregistered shotgun with a barrel less than 18 inches long. 26 U.S.C. §§ 5845(a), 5861(d). A majority of the Courts of Appeals have held that the presence of a sawed-off

shotgun constitutes probable cause that an offense is being committed.[57]

Here, it is undisputed that defendants "found in plain view a sawed-off Mossburg 12-gauge shotgun...."[58] It is also undisputed that decedent fired a shotgun. The undisputed facts and circumstances were sufficient to warrant a prudent man to believe that decedent had violated both Pennsylvania and federal law. Accordingly, defendants had probable cause to arrest decedent.

Constructive Possession

Constructive possession is "the ability to exercise a conscious dominion over the illegal [item]: the power to control the contraband and the intent to exercise that control." Commonwealth v. Valette, 531 Pa. 384, 388, 613 A.2d 548, 550 (1992). See United States v. Introcaso, 506 F.3d 260, 270 (3d Cir. 2007). "Such dominion and control need not be exclusive but may be shared with others." Id. at 271. Constructive possession may be found in one or more persons if the contraband is found in an area of "joint control and equal access."

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[57] See United States v. Wade, 30 Fed.Appx. 368, 371-373 (6th Cir. 2002); United States v. Decoteau, 932 F.2d 1205, 1207 (7th Cir. 1991); United States v. Melvin, 596 F.2d 492, 500-501 (1st Cir. 1979); United States v. Bills, 555 F.2d 1250, 251 (5th Cir. 1977); United States v. Canestri, 518 F.2d 269, 274-275 (2d Cir. 1975); United States v. Story, 463 F.2d 326, 328 (8th Cir. 1972); Porter v. United States, 335 F.2d 602, 607 (9th Cir. 1964).

[58] Defendants' Facts at paragraph 34; Plaintiffs' Facts at paragraph 34.

Valette, 531 Pa. at 388, 613 A.2d at 550; Commonwealth v. Mudrick, 510 Pa. 305, 309, 507 A.2d 1212, 1214 (1986).

Courts have repeatedly found constructive possession by owners and lessees of property where contraband is found. "Pennsylvania considers being a lessee or owner of the residence an important factor in establishing dominion and control over the contraband." Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997). See, e.g., Commonwealth v. Sanes, 955 A.2d 369, 374 (Pa.Super. 2008); Seifrit v. Commonwealth, 100 Pa.Commw. 226, 229, 514 A.2d 654, 656 (1986). Where the contraband is in plain view, courts are more likely to find constructive possession. See Mudrick, 510 Pa. at 309, 507 A.2d at 1214; United States v. Ross, 2007 U.S.Dist. LEXIS 65096, *23 (E.D.Pa. August 31, 2007) (Pratter, J.).

As noted above, it is undisputed that defendants found the shotgun in plain view. It is also undisputed that the events giving rise to this lawsuit occurred in Courtney's home. The undisputed facts and circumstances were sufficient to warrant a prudent man to believe that Courtney was committing an offense by constructively possessing a sawed-off shotgun in his home. Accordingly, defendants also had probable cause to arrest Courtney.

Because defendants had probable cause to arrest both decedent and Courtney, plaintiffs cannot succeed on their Fourth

Amendment claims for unlawful seizure and arrest. Accordingly, I grant summary judgment to defendants on these claims.

Even if defendants did not have probable cause to arrest decedent and Courtney, I would still grant summary judgment to defendants on the basis of qualified immunity.[59] Defendants are entitled to qualified immunity because "a reasonable officer could have believed that probable cause existed to arrest [decedent and Courtney] in light of clearly established law and the information the arresting officers possessed." Blaylock v. City of Philadelphia, 504 F.3d 405, 411 (3d Cir. 2007) (internal punctuation omitted).

Damaging Residence, Destroying Property, and Conspiracy

Plaintiffs also allege that defendants violated their constitutional rights by damaging the Boria residence and plaintiffs' property, and by making public statements and producing official reports "designed to cover up their unlawful and unconstitutional acts as well as the true cause of Decedent's death."[60] Defendants' motion for summary judgment does not address these two claims.

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[59] Because I find below that defendants Broad, McMahon, and the City of Reading are entitled to summary judgment on plaintiffs' constitutional claims under Section 1983, I grant The Reading Defendants' Motion for Summary Judgment as to plaintiffs' claims for unlawful seizure and arrest.

[60] Complaint at page 17.

Rule 7.1(c) of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania requires that all motions "shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion." E.D.Pa.R.Civ.P. 7.1(c).

"Courts in this District have consistently held the failure to cite any applicable law is sufficient to deny a motion as without merit because zeal and advocacy is never an appropriate substitute for case law and statutory authority in dealings with the Court." Anthony v. Small Tube Manufacturing Corp., 535 F.Supp.2d 506, 511 n.8 (E.D.Pa. 2007) (Gardner, J.) (internal punctuation omitted) (quoting Marcavage v. Board of Trustees of Temple University, 2002 U.S.Dist. LEXIS 19397, *10 n.8 (E.D.Pa. September 30, 2002) (Tucker, J.)); see also Purcell v. Universal Bank, N.A., 2003 U.S.Dist. LEXIS 547, *8 (E.D.Pa. January 6, 2003) (Van Antwerpen, J.).

Defendants' motion for summary judgment does not contain this required briefing as to these two claims, and plaintiff did not file a brief. Where a brief is "wholly inadequate" a motion will be denied. Purcell, supra, at *8. Where an issue is not briefed at all by either side, the court will often choose not to reach it. Black v. Premier Company, 2002 U.S.Dist. LEXIS 12389 *3 n.2 (E.D.Pa. July 8, 2002)

(McGirr Kelly, S.J.). Accordingly, I deny defendants' motion for summary judgment as to plaintiffs' Section 1983 claims that defendants violated their constitutional rights by damaging the Boria residence and plaintiffs' property, and by making public statements and official reports to conceal defendants' actions and decedent's cause of death.

Monell Claims[61]

Defendants Chief Broad and Mayor McMahon

There is no liability in individual capacity Section 1983 actions based on a theory of respondeat superior.[62] Heggenmiller v. Edna Mahan Correctional Institution for Women, 128 Fed.Appx. 240, 245 (3d Cir. 2005); C.H. v. Oliva, 226 F.3d 198, 201-202 (3d Cir. 2000). Judge Stengel's September 17, 2007 Order established as the law of this case that

> for the plaintiffs to be successful in their personal capacity claims against the Mayor and the Chief of Police, they will have to show that these defendants were policymakers in the City of Reading who established or maintained policies, customs, or practices which directly caused the constitutional harm to the plaintiffs, and that they did so with deliberate indifference to the consequences; or that these defendants personally participated in violating the constitutional rights of the plaintiffs, or directed others to violate those rights, or had knowledge of and

[61] Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[62] As discussed above, Judge Stengel's September 17, 2007 Order struck all reference to defendants Chief Charles R. Broad and Mayor Thomas McMahon being sued in their official capacities.

> acquiesced in the violations of their subordinates.

Judge Stengel's September 17, 2007 Order at pages 9-10.

"A custom under Monell can usually not be established by a one-time occurrence." Solomon v. Philadelphia Housing Authority, 143 Fed.Appx. 447, 457 (3d Cir. 2005).

Plaintiffs have made only conclusory allegations that the Mayor and Chief of Police established or maintained policies, customs, or practices. Plaintiffs have not put forth any competent evidence from which a jury could reasonably find in their favor on this point. As defendants note, "[p]laintiffs have taken no depositions in this case, nor have they demonstrated that a policy, practice, or custom of the City of Reading caused any constitutional harm to them." Defendants' Brief at page 21. Nor have plaintiffs presented any evidence of personal involvement by the Mayor and Chief of Police. Thus, plaintiffs' claims against the Mayor and Chief of Police fail to survive summary judgment.

Defendant City of Reading

In order to sustain a Monell action, plaintiff must identify some policy, procedure, or practice of the City that authorized or endorsed the actions of its officials. Plaintiff must also show that his injury was proximately caused by the actions of the officials. See Watson v. Abington Township,

478 F.3d 144, 156 (3d Cir. 2007); Bielevicz v. Dubinon, 915 F.2d 845, 850-851 (3d Cir. 1990). "A custom under Monell can usually not be established by a one-time occurrence." Solomon, 143 Fed.Appx. at 457.

A municipality cannot be held vicariously liable for the constitutional violations of its agents under a theory of respondeat superior. See Langford v. Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). Municipal entities are only liable under Section 1983 when execution of a government's policy or custom inflicts the constitutional injury. See Monell, 436 U.S. at 694, 98 S.Ct. at 2037-2038, 56 L.Ed.2d at 638; Langford, 235 F.3d at 847.

Plaintiffs have not put forth any competent evidence from which a jury could reasonably find in their favor that some policy, procedure, or practice of the City of Reading authorized or endorsed the actions of its officials. As defendants note, "[p]laintiffs have conducted no discovery whatsoever, nor have they presented any evidence, to develop their claims against the City of Reading, and thus they cannot present any evidence that would allow a jury to find derivative Monell liability on the part of the City."[63] Thus, plaintiffs' Section 1983 claims against the City of Reading fail to survive summary judgment.

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[63] Defendants' Brief at page 20.

Count III (Survival Act)

Defendants contend that plaintiffs' survival actions should fail because defendants did not cause decedent's death. Defendants appear to have confused wrongful death and survival actions.

Pennsylvania's Survival Act provides that "[a]ll causes of action...shall survive the death of the plaintiff or of the defendant." 42 Pa.C.S. § 8302. A wrongful death action, on the other hand, is brought "for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime." 42 Pa.C.S. § 8301(a).

In Frey v. PECO, the Superior Court of Pennsylvania clearly explained the distinction between survival and wrongful death actions under Pennsylvania law:

> An action for survival damages is completely unlike the action for wrongful death....The survival action has its genesis in the decedent's injury, not his death. In the survival action, the decedent's estate sues on behalf of the decedent, upon claims the decedent could have pursued but for his or her death.... [T]he survival action simply continues, in the decedent's personal representative, the right of action which accrued to the deceased at common law....In contrast, wrongful death is not the deceased's cause of action. An action for wrongful death may be brought only by specified relatives of the decedent to recover damages in

> their own behalf, and not as beneficiaries of the estate.

Frey v. PECO, 414 Pa.Super. 535, 539, 607 A.2d 796, 798 (1992).

Thus, plaintiffs' survival actions survive summary judgment to the same extent that plaintiffs' underlying causes of action which could have been brought by decedent had he lived survive summary judgment. That is, plaintiffs' survival actions for excessive force and for damage to the Boria residence and plaintiffs' property under Section 1983 survive defendants' motion for summary judgment.

Count IV (Wrongful Death)

Count IV of plaintiffs' Complaint alleges a wrongful death action. As noted above, a wrongful death action may be brought under Pennsylvania law "for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime." 42 Pa.C.S. § 8301(a). See Wood v. City of Lancaster, 2009 U.S.Dist. LEXIS 2123, *70 (E.D.Pa. January 13, 2009) (Dalzell, J.); Black v. City of Reading, 2006 U.S.Dist. LEXIS 19014, *26 (E.D.Pa. April 7, 2006) (Gardner, J.).

Because wrongful death is a state law claim, qualified immunity does not apply. Miller v. New Jersey,

144 Fed.Appx. 926, 929 (3d Cir. 2005). However, wrongful death is a state law tort claim governed by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541-8564 ("Tort Claims Act"). See Black, 2006 U.S.Dist. LEXIS 19014 at *27; Bornstad v. Honey Brook Township, 2005 U.S.Dist. LEXIS 19573, *81 n.53 (E.D.Pa. September 9, 2005)(Surrick, J.).

Under the Tort Claims Act, the general rule is that "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S. § 8541. Employees are liable "only to the same extent" as their employing local agencies. 42 Pa.C.S. § 8545. Moreover, an employee may claim immunity if his conduct "was authorized or required by law, or [if] he in good faith reasonably believed the conduct was authorized or required by law." 42 Pa.C.S. § 8546(2).

If the employee's "act constituted a crime, actual fraud, actual malice or willful misconduct," however, the immunity does not apply. 42 Pa.C.S. § 8550. "In the context of alleged police misconduct, 'willful misconduct' means that the police officers committed an intentional tort knowing that their conduct was tortious." Bornstad, 2005 U.S.Dist. LEXIS 19573 at *81 n.53.

The evidence plaintiffs have presented in support of their excessive force claim, discussed above, is also sufficient to create a material issue of disputed fact as to whether the police officers committed an intentional tort knowing that their conduct was tortious. Accordingly, defendants are not entitled to immunity under the Tort Claims Act on summary judgment.

Defendants claim that they are entitled to summary judgment on plaintiffs' wrongful death claim because they did not cause decedent's death. Defendants rely on the autopsy report of Dr. Land, which concluded that the cause of decedent's death was accidental and "due to adverse effects of cocaine and its complications."[64] Plaintiffs' expert medical report was stricken by my December 18, 2008 Order. However, plaintiff Courtney testified in his deposition that multiple police officers repeatedly struck decedent with their flashlights and batons and

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[64] Land Report at pages 2-3.

Defendants argue that, following Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), the court should discredit Courtney's deposition testimony and grant summary judgment to defendants based upon Dr. Land's autopsy report. In Scott, a videotape of the events clearly contradicted and utterly discredited plaintiff's version of the facts. The Supreme Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott, 550 U.S. at ___, 127 S.Ct. at 1776, 167 L.Ed.2d at 694.

Dr. Land's autopsy report does not reach the level of the Scott videotape. Different conclusions as to the cause of death can easily be drawn even from agreed upon medical observations. Moreover, as discussed, the decedent's injuries observed by Dr. Land are not inconsistent with the beating Courtney describes. Accordingly, I decline defendants' invitation to elevate an autopsy report's conclusion as to cause of death to the level of a videotape and to grant summary judgment on this basis in the face of disputed material facts.

kicked, hit, and stomped on him.[65] This testimony is sufficient to create a material issue of disputed fact as to the cause of decedent's death.

Expert Medical Testimony Not Required

Plaintiffs do not have an expert witness to opine on the cause of decedent's death because I struck the report of plaintiffs' former expert, Dr. John Shane, and ruled that he could not testify, for reasons I enumerated above in this Opinion. Nevertheless, Pennsylvania courts do not require expert medical testimony "where death (or injury) is so immediately and directly, or naturally and probably, the result of accident that the connection between them does not depend solely on the testimony of professional or expert witnesses." Furman v. Frankie, 268 Pa.Super. 305, 308, 408 A.2d 478, 479 (1979) (quoting Tabuteau v. London Guarantee & Accident Company, Limited, 351 Pa. 183, 186, 40 A.2d 396, 398 (1945)).

"The law is well established that expert testimony is not necessary where the cause of an injury is clear and where the subject matter is within the experience and comprehension of lay jurors." Montgomery v. Bazaz-Sehgal, 568 Pa. 574, 590, 798 A.2d 742, 752 (2002).

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[65] Courtney Deposition at pages 85-88 and 93-94.

Moreover, a jury may reasonably infer that defendants' actions caused the death of decedent without expert medical testimony, even though decedent's medical condition also could have contributed to his death. In McCoy v. Spriggs, the Superior Court of Pennsylvania held that expert medical testimony was not required to establish that decedent's death from a ruptured blood vessel was caused by the exertion of a friendly wrestling match, even though decedent "had diseased sclerotic blood vessels which made them more susceptible to rupture." 102 Pa.Super. 500, 157 A. 523 (1931). That court explained:

> True, Dr. Ramsey did testify that deceased had diseased sclerotic blood vessels which made them more susceptible to rupture, but that fact does not defeat a right to compensation....It is a matter of common knowledge that wrestling requires unusual exertion, which, the doctor testified, increases the blood pressure, which, in turn, may result in a rupture of a blood vessel, and, as here, cause death. The physical strain and death immediately following present an intimate relation between the cause and effect of the cerebral hemorrhage....

Id.

Here, defendants' expert Dr. Land concluded that the interaction of having an enlarged heart, excited delirium, and cocaine toxicity, and engaging in a physical struggle, caused decedent's death.[66] However, Dr. Land also noted that

[66] Land Report at page 3.

> [d]uring a struggle, there is a massive release of...chemicals [which] cause increased rate in force of contraction of the heart, increased conduction velocity, and increased blood pressure; all of these events in turn increase the oxygen demand of the heart....It is well established that there is a very high risk of cardiac arrhythmia as catecholamines rise and potassium drops.

Land Report at page 2.

Indeed, this is consistent with a lay juror's common sense knowledge of medicine: When you exert yourself, your heart rate increases. Thus, a jury could reasonably find that defendants' actions caused decedent's death without expert medical testimony, even if decedent had an enlarged heart and cocaine in his system when he died.

If Courtney's testimony is credited, a jury could reasonably find that decedent's death was so immediately and directly, or naturally and probably, the result of defendants' excessive force that expert medical testimony is not necessary. Pennsylvania courts have not required expert medical testimony where the decedent died shortly after suffering severe physical injuries.

In Mars v. Philadelphia Rapid Transit Co., a man was struck by a trolley, dragged under the car for twenty-three feet, and pronounced dead shortly thereafter. 303 Pa. 80, 88, 154 A. 290, 292 (1931). An autopsy was not performed and there was no medical testimony as to the cause of death. Mars, 303 Pa. at 82, 154 A. 290. The Supreme Court of Pennsylvania held that

"the death of plaintiff's decedent was due to the street car striking him and pushing him along the rail for 23 feet is a fact deducible as a reasonable inference from the facts and conditions directly proved." Mars, 303 Pa. at 88-89, 154 A. at 292.

More recently, in Furman v. Frankie, a bar-goer was slapped by the bartender and hit on the forehead with a beer bottle, causing her to bleed from her nose and mouth. 268 Pa.Super. 305, 307, 408 A.2d 478, 479 (1979). She was found dead a few hours later. Furman, 268 Pa.Super. at 308, 408 A.2d at 479. The Pennsylvania Superior Court held "that the testimony offered by plaintiff reasonably tended to prove circumstances sufficient, without medical testimony, to make out a prima facie case that the death of decedent was caused by the injuries she received in the tavern and the events occurring subsequent thereto." Id.

Here, as discussed above, plaintiffs have presented evidence that decedent was on the floor and handcuffed while multiple police officers repeatedly struck decedent with their flashlights and batons, and kicked, hit, and stomped on decedent. A jury crediting this evidence could reasonably find that this beating caused decedent's death without resorting to expert medical testimony.

"Where the disability complained of is the natural result of the injuries a jury may be permitted to so find, even

in the absence of expert opinion." Paul v. Atlantic Refining Company, 304 Pa. 360, 364, 156 A. 94, 95 (1931). Death is a natural result of the severe beating plaintiffs allege.

Moreover, there is evidence in Dr. Land's autopsy report which, drawing all reasonable inferences in favor of the plaintiffs, tends to corroborate Courtney's deposition testimony. Dr. Land's autopsy report noted that decedent had "blunt force trauma to the head," a fractured rib, and "handcuff-like trauma to the left wrist."[67] Dr. Land also noted various abrasions on decedent's head, arms, and legs.[68] This evidence lends further support to my conclusion that a jury could reasonably find that defendants' actions caused decedent's death.

Courts are more willing to allow plaintiffs to recover without presenting expert medical testimony on causation where the injuries appeared immediately after the incident, rather than a significant time later. McArdle v. Panzek, 262 Pa.Super. 88, 93-94, 396 A.2d 658, 661 (1978). "The factor of immediacy is specifically stressed by several cases." Id.

Here, decedent's injuries were immediately apparent, and it is undisputed that decedent was pronounced dead on arrival at the hospital.[69] The immediacy of decedent's injuries (and

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[67] Land Report at page 3.

[68] Land Report at pages 5-7.

[69] Defendants' Facts at paragraph 19; Plaintiffs' Facts at paragraph 19.

death) further supports my conclusion that plaintiffs do not need expert medical testimony on causation to survive summary judgment in this case.

At this time, defendants are not entitled to immunity under the Torts Claim Act on plaintiffs' claim for wrongful death. Plaintiffs have presented evidence sufficient to create a material issue of disputed fact as to the cause of decedent's death. Accordingly, I deny defendants' motion for summary judgment as to plaintiffs' claim for wrongful death.

Count V (Intentional Infliction of Emotional Distress)

Although the Supreme Court of Pennsylvania has "never expressly recognized a cause of action for intentional infliction of emotional distress," it has cited Section 46 of the Restatement (Second) of Torts "as setting forth the minimum elements necessary to sustain such a cause of action." Taylor v. Albert Einstein Medical Center, 562 Pa. 176, 181, 754 A.2d 650, 652 (2000).

Where extreme and outrageous conduct is directed at a third person, the actor is liable

> if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

> (b) to any other person who is present at the time, if such distress results in bodily harm.

Id. (quoting Restatement (Second) of Torts § 46(2)).

The Supreme Court of Pennsylvania has explicitly emphasized that presence at the scene of the conduct is an "essential element which must be established." Taylor, 562 Pa. at 182, 754 A.2d at 653. Here, it is undisputed that plaintiffs Boria and Ayala were "not present and did not witness any portion of the incident."[70] Thus, plaintiffs Boria and Ayala cannot recover for intentional infliction of emotional distress. Accordingly, I grant defendants' motion for summary judgment as to plaintiffs Boria's and Ayala's claims for intentional infliction of emotional distress.

Plaintiff Courtney was present at the scene and witnessed the incident. However, "Pennsylvania requires that competent medical evidence support a claim of alleged intentional infliction of emotional distress." Bougher v. University of Pittsburgh, 882 F.2d 74, 80 (3d Cir. 1989); see Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 197, 527 A.2d 988, 995 (1987). Thus, "[e]xpert medical testimony is required to establish a claim for intentional infliction of emotional distress." Shiner v. Moriarty, 706 A.2d 1228, 1239 (Pa.Super. 1998); see Barbour v. Commonwealth, 557 Pa. 189, 194,

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[70] Defendants' Facts at paragraphs 43-44; Plaintiffs' Answer to Defendants' Statement of Undisputed Facts ("Plaintiffs' Facts") at paragraphs 43-44.

732 A.2d 1157, 1160 (1999); Bolden v. SEPTA, 21 F.3d 29, 35 (3d Cir. 1994).

Courtney has presented no competent medical evidence to support his claim for intentional infliction of emotional distress. In his deposition, Courtney testified that he attended a single one hour counseling session shortly after the incident.[71] Plaintiff Courtney further testified that he had not seen any other counselors except for his "family physician... [t]hrough Reading Hospital," but that he had not been there for over a year and did not talk specifically about the incident with them.[72]

Courtney also testified that, since the incident, he has suffered "two mini-strokes" and has had difficulty sleeping.[73] Courtney's deposition testimony clearly does not satisfy Pennsylvania's requirement that there be competent medical evidence in support of a claim for intentional infliction of emotional distress. Accordingly, I grant defendants' motion for summary judgment as to Courtney's claim for intentional infliction of emotional distress.

Plaintiffs also attempt to aver a claim for intentional infliction of emotional distress on behalf of the decedent. As

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[71] Courtney Deposition at pages 115-118.

[72] Courtney Deposition at pages 117-119.

[73] Courtney Deposition at pages 118 and 157-158.

with Courtney, however, plaintiffs have presented no competent medical evidence in support of this claim. Accordingly, for the reasons discussed in regard to Courtney above, I grant defendants' motion for summary judgment as to decedent's claim for intentional infliction of emotional distress.

Counts VII (False Arrest) and VIII (False Imprisonment)

Although not totally clear from the Complaint, plaintiff Courtney appears to bring claims for false arrest and false imprisonment for his allegedly unlawful arrest under state tort law.

False arrest and false imprisonment provide the closest analogy to a Section 1983 claim for an arrest in violation of the Fourth Amendment. Wallace v. Kato, 549 U.S. 384, ___, 127 S.Ct. 1091, 1095, 166 L.Ed.2d 973, 980 (2007). "False arrest and false imprisonment overlap; the former is a species of the latter." Id. Both false arrest and false imprisonment require proof that the police lacked probable cause to arrest. Groman, 47 F.3d at 634, 636.

As noted above in my discussion of plaintiffs' Fourth Amendment claims for unlawful seizure and unlawful arrest, the undisputed facts show that defendants had probable cause to arrest Courtney. Accordingly, plaintiff Courtney cannot succeed on his false arrest and false imprisonment claims, and I grant summary judgment to defendants on these claims.

Even if defendants did not have probable cause to arrest Courtney, I would still grant summary judgment to defendants on the basis of the Tort Claims Act.[74] Under the Tort Claims Act, an employee may claim immunity if his conduct "was authorized or required by law, or [if] he in good faith reasonably believed the conduct was authorized or required by law." 42 Pa.C.S. § 8546(2). Defendants are entitled to immunity under the Tort Claims Act because, even if their arrest of Courtney were not in fact lawful, defendants reasonably could have believed that their conduct was authorized by law.

Fictitious John Doe Defendants

Plaintiffs named fictitious defendants John Does 1-X as defendants in all counts of the Complaint. The case law is clear that fictitious parties must eventually be dismissed, if discovery yields no identities. Hindes v. FDIC, 137 F.3d 148, 155 (3d Cir. 1998); Guerra v. GMAC LLC, 2009 U.S.Dist. LEXIS 13776, *25 (E.D.Pa. February 20, 2009) (Davis, J.); Scheetz v. Morning Call, Inc., 130 F.R.D. 34, 37 (E.D.Pa. 1990)(Cahn, J.).

This case commenced on September 29, 2006. Judge Stengel's Scheduling Order dated September 18, 2007 ordered discovery to be completed by December 14, 2007. Judge Stengel's

[74] Qualified immunity does not apply to state law claims, including torts such as false arrest and false imprisonment. Miller v. New Jersey, 144 Fed.Appx. 926, 929 (3d Cir. 2005).

February 19, 2008 Order granted defendants an additional sixty days from the date of the Order to complete all fact discovery. As of the date of this Opinion, discovery has been closed for some time, but plaintiffs have not identified the John Doe defendants. Therefore, I dismiss the fictitious defendants John Does 1-X from this action.

CONCLUSION

For all the foregoing reasons, I grant in part and deny in part The Reading Defendants' Motion for Summary Judgment.

Specifically, I grant the motion as to plaintiffs' federal constitutional claims under Section 1983 in Count I for delaying medical treatment, unlawful seizure and arrest, and plaintiffs' various Monell claims. I also grant the motion as to plaintiffs' state-law claims for negligence and negligent supervision (Count II), intentional infliction of emotional distress (Count V), negligent infliction of emotional distress (Count VI), false arrest (Count VII) and false imprisonment (Count VIII).

Because all claims against them have been dismissed, I dismiss defendants Chief Charles R. Broad, Mayor Thomas McMahon and the City of Reading as parties to this action. In addition, I dismiss the fictitious defendants, John Does I-X, because discovery has closed without plaintiffs identifying those defendants.

I deny the motion for summary judgment as to plaintiffs' federal Section 1983 constitutional claims in Count I for excessive force, unlawful damage to the residence and destruction of property, and conspiracy. I also deny the motion as to plaintiffs' state claims under the Pennsylvania Survival Act (Count III) and the Pennsylvania Wrongful Death Act (Count IV).